U.S. Department of Justice

Immigration and Naturalization Service

D7

prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 99 244 51375 Office: VERMONT SERVICE CENTER Date: FEB 21 2003

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER: [redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. A subsequent appeal and motion were dismissed by the Administrative Appeals Office (AAO). The matter is now before the AAO on a second motion to reopen and reconsider. The motion will be granted. The previous decision of the AAO will be affirmed.

The petitioner is an import/export company that seeks to employ the beneficiary temporarily in the United States as the president of its new office. The director determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity, or that the United States operation, within one year, would support a managerial or executive position.

On appeal, counsel argued that the evidence submitted by the petitioner was not viewed properly by the Service, and that the beneficiary is and has always been employed in an executive/managerial capacity. The AAO affirmed the director's determination that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity, or that the U.S. company would support such a position within one year of operation. Beyond the decision of the director, the AAO determined that the petitioner had not established that the beneficiary had been employed in a primarily executive or managerial capacity abroad.

On the first motion, counsel submitted additional documentation to address the grounds of the director's denial and the findings of the AAO. However, a review of that evidence determined that the petitioner had submitted no new evidence having a bearing on the issues raised in the previously issued decisions of the director and the AAO.

In this second motion, counsel submits an approval notice showing that an immigrant visa petition for an alien worker (Form I-140) filed by the petitioner was approved in behalf of the beneficiary in this case on September 4, 2001. That petition was filed pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act requesting that the beneficiary be classified as a multi-national executive or manager. Counsel argues that the fact that the Service has already approved the beneficiary's status as a "multinational executive or manager" mandates the approval of this petition.

Counsel also argues that if the L-1A nonimmigrant visa petition is not approved and the beneficiary's status is not recognized, he would become an undocumented ("illegal") alien retroactively as of the filing date of the I-129 petition and would not be eligible to have his status adjusted to that of a lawful permanent resident.

Counsel further states: "the burning question is why would the Service fail to consider the merits of the issue and, instead, summarily reject a claim that is certainly worthy of consideration, specifically when the claim is a congressionally encouraged most favored status as a "multinational executive/manager" which is already approved for the beneficiary."

The petitioner objects to the denial of this petition in view of the approval of the beneficiary's I-140 immigrant visa petition. This Service is not required to approve applications or petitions where eligibility has not been demonstrated. The AAO is not bound to follow what might be a contradictory decision of a service center. *Louisiana Philharmonic Orchestra v INS*, 44 F.Supp. 2d 800, 803 (E.D. La. 2000), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Additionally, the approval of the I-140 immigrant visa petition, in the beneficiary's behalf, may have been approved in error.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

8 C.F.R. § 214.2(l)(1)(ii), in part, states:

> Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The issue in this proceeding is whether the petitioner has established that the beneficiary has been and will be employed in a primarily managerial or executive capacity as of August 13, 1999, the date the L-1 nonimmigrant visa petition was filed.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner described the beneficiary's job duties abroad as follows:

Works as managing director in charge of the general management, decision for major projects, investment, hiring & firing.

[redacted] has been serving in executive position for [redacted] since February 1994. He first directed the management of [redacted] (Hong Kong), a branch company of [redacted] then the parent company. He is specialized in foreign trade business; his responsibilities include setting up goals and policies for the company; having extensive discretionary decision-making authority; and receives only general direction from Chairman and the Board of [redacted] In addition to responsible for overall policy and management decision making in [redacted] he has been responsible for overall sales and promotion for the company.

The record contains no information concerning the beneficiary's staff abroad (if any) and outlines his duties in general and vague terms. It is determined that record contains insufficient evidence to demonstrate that the beneficiary had been acting in a managerial or executive capacity abroad. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title.

The petition describes the beneficiary's prospective job duties in the United States as follows:

> Supervises the overall operation of the company by signing documents, hiring & firing, policy-making and promoting business.

The petitioner describes the beneficiary's projected job duties for the new business in the United States as follows:

> Widthman is the first foreign subsidiary of Widthman Lt. The success of this operation will define Widthman Ltd.'s international business expansion. Having decided to give great emphasis to its U.S. subsidiary, the Management [redacted] Appointed company's president, [redacted] as the Chairman and President of the new subsidiary company. This position is a key executive position with [redacted]

In a letter dated July 29, 1999, the Chairman of [redacted] Abroad explains the following:

> As President of [redacted] will take charge of all corporate affairs. He will be responsible for establishing policies, goals of operation, setting up business contacts with other companies in the U.S.; negotiating and executing business contracts and investment proposals; recruiting and supervising employees, and overseeing marketing activities. He will be involved in daily decision making process and have the authority in firing and hiring employees.

Counsel's assertions concerning the managerial and executive nature of the beneficiary's future duties are not persuasive. The petitioner's descriptions of the beneficiary's proposed job duties in the United States and his duties abroad are not sufficient to warrant a finding of managerial or executive capabilities. It is noted that the assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec.533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter *of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met, as the petitioner has not provided any additional evidence to overcome the previous decision of the AAO.

ORDER: The decision of the Associate Commissioner dated August 30, 2002 is affirmed.